No. 87-1167

In the Supreme Court of the United States

OCTOBER TERM, 1987

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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In the petition, we showed that the courts of appeals are in serious conflict over the proper allocation of the burdens and standards of proof in so-called mixed-motive cases arising under Title VII; and in this case the court of appeals itself acknowledged the existence of a conflict among the circuits (Pet. App. 20a-23a & n.8). Respondent's Brief in Opposition does not demonstrate otherwise.

1. Despite the multi-faceted split in the circuits on the appropriate allocation of the burden of proof in mixed-motive Title VII cases (see Pet. 13-17), respondent argues that "[t]here is no division in the circuits warranting review by this Court" (Br. in Opp. 10), because the Court already has decided that the defendant in a mixed-motive case bears the burden of proving that its decision would have been the same without discrimination. Respondent relies on this Court's decisions in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983);

Mt. Healthy City School Dist. v. *Doyle*, 429 U.S. 274 (1977); and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). But none of those cases involved Title VII, and none addressed the specific structure and language of that statute, which specifies that Title VII is not violated unless there is proof that the employment decision was *caused* by illegal motives, and which specifically prohibits courts from intervening if the employment decision was based on "any reason other than discrimination." 42 U.S.C. § 2000e-5(g). See Pet. 20 & n.10.[1]

The proposition that the Title VII burden of proof issue is not governed by the cited cases is demonstrated by the fact that the conflict among the circuits developed *after* this Court's decisions in *Transportation Management*, *Mt. Healthy*, and *Village of Arlington Heights*. See *McQuillen* v. *Wisconsin Education Ass'n Council*, 830 F.2d 659, 664 (7th Cir. 1987), petition for cert. pending, No. 87-999 (filed Dec. 11, 1987); *Bellissimo* v. *Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 365-366 (4th Cir. 1985); *Jack* v. *Texaco Research Center*, 743 F.2d 1129,

[1] Respondent contends (Br. in Opp. 8-9) that the Court *has* applied the *Mt. Healthy* test in a Title VII case, citing *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395, 403 n.9 (1977). Although *East Texas* was a case arising under Title VII, it did not involve any issue concerning the allocation of the burden of proof in Title VII actions. The only issue the Court decided in *East Texas* was that the court of appeals had erred in reversing the district court's dismissal of plaintiffs' class action allegations and in certifying a class on its own. In the footnote upon which respondent relies, the Court merely noted in passing that, even assuming that the employer's refusal to consider the plaintiffs' job applications had been discriminatory, the employer would have been entitled to show that the plaintiffs were not qualified for the positions they sought.

1131 (5th Cir. 1984).[2] Thus, it remains the case that "there is 'considerable confusion' regarding the proper standard of proof in Title VII cases." *Bellissimo*, 764 F.2d at 175. That this confusion exists within the circuits as well as among them (see Br. in Opp. 10 n.4) only underscores the need for plenary review by this Court.

2. As we demonstrated in the petition (at 15, 16), the circuits are in conflict on yet another issue presented by this case. Even those circuits that agree that the *defendant* must make the but-for showing in a mixed-motive case do not agree on the standard of proof: some circuits require the defendant to carry its burden by clear and convincing evidence, while others hold that the correct standard is proof by a preponderance of the evidence.

Unable to deny the existence of this conflict (see Br. in Opp. 11), respondent nevertheless urges the Court to deny the petition because the result in this case allegedly would be the same regardless of which standard is employed and because Price Waterhouse did not adequately raise the issue below. Neither contention is correct.

[2] Respondent contends (Br. in Opp. 10 n.4) that some of these cases did not involve "mixed-motive" situations. Respondent is incorrect. In *Ross* v. *Communications Satellite Corp.*, 759 F.2d at 366, for example, the Fourth Circuit clearly was referring to mixed-motive cases when it stated expressly that it "reject[ed] the view that Title VII has been violated if retaliation for protected activity was merely 'in part' a reason for the adverse action." And in *Bellissimo* v. *Westinghouse Elec. Corp.*, the Third Circuit reaffirmed its position that the plaintiff in a Title VII action must show that his status as a minority class member was the "but-for" reason for the challenged employment decision. The *Bellissimo* court relied on *Lewis* v. *University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984)—a case the court of appeals itself recognized as being in conflict with its decision in this case. See Pet. App. 23a.

First, respondent's grudging concession (Br. in Opp. 11 n.5) that Price Waterhouse *did* in fact raise this issue below—supposedly in a "short footnote" in its petition for rehearing in the court of appeals—is incomplete. In fact, this point permeated the entire petition for rehearing.[3] And there was no reason for Price Waterhouse to raise the point prior to the rehearing stage because it did not become a material issue until the court of appeals rendered its decision.[4]

Respondent's further contention, that the choice between a preponderance standard and a clear and convincing standard is inconsequential in this or any other case, is astonishing. The District of Columbia Circuit has itself recognized that the "clear and convincing"

[3] In its petition for rehearing, Price Waterhouse contended, *inter alia*, that the majority opinion had erroneously sanctioned a reduced evidentiary burden for Title VII plaintiffs. Among other things, Price Waterhouse took issue with the majority's application of the clear and convincing standard:

> Where a plaintiff satisfies the reduced burden [sanctioned by the majority opinion], liability is found even though the employer may have demonstrated by a "preponderance of the evidence" a "determinative" nondiscriminatory basis for the decision. Under the majority's formulation, the employer can avoid liability only by proving by "clear and convincing" evidence that the nondiscriminatory basis was determinative * * *.

Pet. for Rehearing 5; see also *id.* at 7, 8 n.3, 11.

[4] The district court discussed the standard of proof issue only in the context of considering an appropriate remedy for the violation it found. Pet. App. 59a. The district court ultimately concluded that Hopkins was not entitled to any affirmative relief. Thus, there was no reason for Price Waterhouse to challenge the district court's statement that the employer must demonstrate by clear and convincing evidence that its decision would have been the same absent discrimination, because that statement had no effect on the relief ordered by the district court. It was not until the court of appeals' decision on liability and its remand for further proceedings on the question of remedy that the standard of proof issue became ripe for meaningful challenge.

standard imposes an "extraordinary and difficult" burden on the employer; *Toney* v. *Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983); and this Court has stressed that "adopting a 'standard of proof is more than an empty semantic exercise.'" *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (citation omitted).

This case illustrates the common sense of these statements. The court of appeals found Price Waterhouse liable solely "[b]ecause Price Waterhouse could not demonstrate *by clear and convincing evidence* that impermissible bias was not the determinative factor" in the firm's decision to place Hopkins' partnership candidacy on "hold" for at least one year. Pet. App. 25a (emphasis added). The factual findings made by the district court demonstrate that it is highly unlikely that the court of appeals could have reached that result under a "preponderance" standard. To summarize, the district court found that (1) "[Hopkins] had considerable problems dealing with staff and peers," (2) "[Hopkins'] conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision" to place Hopkins' partnership bid on "hold," (3) "[i]t is clear that the complaints about [Hopkins'] interpersonal skills were not fabricated as a pretext for discrimination," (4) "Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between [Hopkins] and the male partners with whom she compared herself," (5) "the firm's emphasis on negative comments [about Hopkins] did not, by itself, result in any discriminatory disparate treatment," and (6) "the comments of the individual partners and the expert evidence * * * [did] not prove an intentional discriminatory motive or purpose." Pet. App. 46a-47a, 48a, 50a, 54a, 59a. Based on these findings, the district court was unable to conclude that Hopkins "would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations." *Id.* at 59a.

In view of these findings, it is a fair conclusion that application of the "clear and convincing" standard played a decisive role in the outcome of this case. If Price Waterhouse's proof, all of which was accepted in the district court's factual findings, was insufficient to meet a preponderance of the evidence standard, then it is clear that *no* defendant could ever satisfy its evidentiary burden. That, obviously, is why the court of appeals went out of its way to specify that Price Waterhouse's burden was to prove nondiscrimination by "clear and convincing" evidence. And that is why the conflict in the circuits on the standard of proof issue warrants review by this Court.[5]

3. We need not dwell on respondent's contention that Price Waterhouse's real quarrel is with the facts found by the district court and affirmed by the court of appeals. (Respondent's own recitation of the facts in this connection is lopsided. Respondent simply ignores the facts justifying the district court's finding that there existed a legitimate, nondiscriminatory basis for the firm's decision. Instead, respondent belabors (Br. in

[5] Respondent relies (Br. in Opp. 12) on a regulation promulgated by the Equal Employment Opportunity Commission that requires an agency found to have discriminated against an applicant for employment to "offer the applicant employment of the type and grade denied him or her, unless the record contains clear and convincing evidence that the applicant would not have been hired even absent discrimination." 29 C.F.R. § 1613.271. But this regulation applies only to federal administrative proceedings, not to judicial proceedings involving *either* federal or private sector employees. Indeed, the inapplicability of the EEOC's regulation to judicial proceedings is clearly demonstrated by *Bibbs* v. *Block*, 778 F.2d 1318, 1324 n.5 (8th Cir. 1985) (en banc). The case involved a federal employee's Title VII claim, but the court expressly rejected the clear and convincing standard in favor of the preponderance standard. In federal *administrative* proceedings, the government is of course free to impose a higher burden upon itself than Title VII requires, but the EEOC has no authority to establish rules of decision for the federal courts.

Opp. 3, 4, 6, 7) a single comment, made *after* the partnership decision and not in any way part of the partnership decisionmaking process.[6] As the petition and the foregoing discussion make clear, Price Waterhouse is asking this Court to resolve significant issues of law that will ensure the fair and even-handed enforcement of the civil rights laws in accordance with congressional intent.

It is, of course, true that we are asking this Court not only to decide whether the burden of persuasion should shift in Title VII cases, but if so, also to consider the question of what categories of cases are appropriate candidates for any such shift. As we explained in the petition (at 23-26), the court of appeals was able to evade *Burdine*'s allocation of the burden of proof in Title VII cases only by characterizing this case as a "mixed-motive" situation, and did so on the basis of gossamer evidence, including the testimony of an expert who had never met Hopkins and who knew nothing of Hopkins' actual behavior at Price Waterhouse. This obviously raises the fundamental question of what are the proper predicates for finding that a case involves "mixed motives." Contrary to respondent's contention (Br. in Opp. 6-8), we do not challenge the lower courts' findings under the clearly erroneous standard; rather, we ask the Court to address the legal question of the *character* of the evidence needed to trigger a "mixed-motive" analysis. As Professor Jaffe has explained, "[t]he application of law requires a fac-

[6] Hopkins testified that *after* her partnership candidacy had been placed on "hold," the partner in charge of her local office and her strongest supporter, Mr. Beyer, advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Pet. App. 52a (citing Tr. 102, 316). The record is clear that Mr. Beyer's advice was an entirely personal reaction to her situation and gives no probative insight into the actual reasons for her rejection. See Tr. 87-95, 168, 212-213. As Judge Williams correctly recognized in dissent (Pet. App. 31a-32a), the record provides absolutely no support for attributing Mr. Beyer's personal views to the Policy Board.

tual predicate; an action without such a predicate is lawless." Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020, 1021 (1956).

Clearly, the Court cannot sensibly decide how the burden of proof in Title VII cases should be allocated without considering the types of cases to which any rule of law that it announces will apply. And this case is appropriate for review precisely because it provides such a vivid illustration of the danger that a new burden of proof rule will be applied on the basis of such ephemeral factual predicates that *Burdine*'s fundamental rule will be completely eroded.

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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